U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 29 2007

LIN 05 070 51768

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral research associate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief. For the reasons discussed below, while the director referenced some types of evidence not required for the benefit sought, we concur with the director's ultimate conclusions.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Engineering from Louisiana Tech University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, Micro-Electro-Mechanical Systems (MEMS) research, and that the proposed benefits of his work, better gas detection systems, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The director noted that the record lacked evidence that the petitioner's published articles had been well cited and asserted that the reference letters discuss the potential of the petitioner's accomplishments and that "many" of them derive from the petitioner's close colleagues. The director further concluded that the letters were not supported by evidence that the petitioner has been asked to provide "guidance and advice" or review manuscripts.

On appeal, counsel asserts that the director applied too high a standard, requiring the type of evidence necessary for the extraordinary ability classification set forth at section 203(b)(1)(A) of the Act. Counsel further asserts that citation is not a requirement for a national interest waiver, that the director took certain phrases in the reference letters out of context and that four of the nine letters are from independent experts.

While the director requested evidence of awards and memberships in the request for additional evidence, the director did not cite the lack of such evidence as the basis for the final denial. While the director did note the lack of evidence that the petitioner had reviewed manuscripts submitted for publication, the director's ultimate concern that the record lacks corroborating evidence of the petitioner's influence in the field is valid. We will consider the letters in detail below.

In his initial cover letter, counsel asserts that a "minimally qualified worker" could not serve the projects on which the petitioner is working and would be "ill equipped to continue the work already commenced by" the petitioner. Counsel continues that "any employer who is engaged in research which serves the national interest has the right to demand the best and the brightest and should not be compelled to employ person[s] who are 'minimally qualified.'" Counsel concludes that this situation "was the whole purpose of creating the national interest waiver." Counsel provides no citation to the statute or any legislative history in support of this assertion.

It is the position of Citizenship and Immigration Services (CIS) to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization, such as researchers. *Id.* at 217. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

As stated above, the petitioner received his Ph.D. from Louisiana Tech University in May 2004. The petitioner performed his doctoral research in the laboratory of Dr. [redacted]i. The

petitioner's doctoral work also involved a collaboration with scientists at Oak Ridge National Laboratory. The petitioner then accepted a postdoctoral research associate position at the University of Illinois at Urbana-Champaign (UIUC) in the laboratory of Dr. Rich Masel. The petitioner must establish eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The petitioner filed the petition on January 7, 2005, eight months after starting work at UIUC. The record does not reflect that the petitioner had presented or published any of his work at UIUC as of the date of filing. As such, the petitioner bears a heavy burden of establishing that any of his work at UIUC had been influential as of that date.

We will consider the petitioner's letters below. At the outset, however, we note that Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of the novelty and importance of a given project are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

Dr. [redacted] discusses the importance and multiple applications for microcantilever biosensors. The petitioner's focus in Dr. [redacted]s laboratory was "to fabricate and characterize micro/nanocantilevers using processing widely employed in microelectronics and microelectromechanical systems (MEMS) and nano technology." According to Dr. [redacted]

> [The petitioner] developed a SiO_2 microcantilever array with novel process. This work resulted in a published paper in [the] *Journal of Sensors and Actuators,* a pending patent application and a report in *Micro/Nano Newsletters*. This microsensor was used to detect HF and F^- with unprecedented sensitivity and selectivity. [The petitioner] continued to explore micro/nano fabrication technology. He came up with a new idea of hyperhydrophobic nanoneedle film synthesized by a reactive ion etching (RIE) technique. This film was implemented and with an unprecedented contact angle at 179.8°.

While counsel asserts that the director erred in failing to consider the petitioner's past achievements and focusing on the future predictions of the petitioner's influence, it is noted that it is this completed work that Dr. Ji asserts "*will* receive worldwide attention as a highly *promising* technique in the development of micro chem./biosensors." (Emphasis added.)

Finally, Dr. [redacted] asserts that the United States is experiencing a gap between the supply and demand of top researchers in this field. Dr. [redacted] concludes that "it would be a great mistake to require labor certification for the best and brightest of talents in these fields when so many positions are unfilled and so many opportunities are unrealized." As stated above, the issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dep't of Transp.*, 22 I&N Dec at 221.

Dr. [redacted] and Dr. [redacted] of Oak Ridge National Laboratory also praises the petitioner's Ph.D. research. While counsel asserts on appeal that these scientists are independent of the petitioner, both scientists are listed as coauthors of the petitioner's 2004 article in *Analytical Chemistry*. Dr. [redacted] discusses the petitioner's development of a SiO_2 microcantilever microsensor. Dr. [redacted] notes that this work *was* highlighted by *Micro/Nano Newsletters* and asserts that it "will be of benefit to other researchers in the field" and "will be cited by other researchers in this field." Once again, Dr. [redacted] is opining that the petitioner's *completed* research *will* prove influential. Thus, we are not persuaded by counsel's assertion that the director took these speculative assertions out of context.

In addition, Dr. [redacted] asserts that they collaborated on a SiO_2 microcantilever sensor used to detect femtomolar concentrations of hydrogen fluoride (HF), a major component of many nerve agents. While Dr. [redacted] discusses the many applications of this work, he fails to assert that any manufacturer, military laboratory or other government agency has expressed any interest in manufacturing or using this sensor.

Finally, Dr. [redacted] notes that the petitioner "co-holds an institutional report of invention" for new sensor micromanufacturing techniques, such as the hyperhydrophobic surface with the unprecedented angle. The record includes a letter from Louisiana Tech University documenting that the petitioner is a named co-inventor on two inventions filed with their Office of Economic Development and Technology Assessment but the letter does not indicate whether or not the office decided to file a patent application for these inventions. Moreover, as stated above, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221, n. 7. The record lacks evidence that any manufacturer or other entity has expressed an interest in licensing these inventions.

Dr. [redacted] provides similar information. Dr. [redacted] provides no explanation, however, for his assertion that the petitioner's work "has resulted in well-cited published papers." The record contains no evidence of any independent citations of the petitioner's work. Dr. [redacted] also asserts that the

petitioner's work has "potential clinical applications," such as pulse monitors and the hyperhydrophobic nanomaterial used in health care settings as microporous vents. The record lacks evidence from medical equipment manufacturers or medical facilities confirming that they are pursuing these uses of the petitioner's work.

The record does contain two letters from independent researchers. Dr. [redacted], Chief Scientific Officer and Co-Founder of [redacted] a research and service company in Chicago, asserts that he became aware of the petitioner's work during a 2004 American Chemistry Society (ACS) meeting in California. Dr. [redacted] asserts that the petitioner's work constitutes a significant contribution to the field, but does not indicate that he has been influenced by the petitioner's work. In fact, Dr. [redacted] curriculum vitae does not reveal any experience with MEMS, the petitioner's area of research. Thus, Dr. [redacted] has not established his qualifications to evaluate the petitioner's work.

The remaining independent letter is from Dr. [redacted], Director of the [redacted] Lab at the University of Missouri-Columbia. Dr. [redacted] does not explain, however, how he came to know of the petitioner's work, only that he "would like to review" it. Although Dr. [redacted] and the petitioner both obtained their bachelor degrees at Nanjing University of Aeronautics and Astronautics, their time there did not overlap. The petitioner lists Dr. [redacted] one of his references on his curriculum vitae but does not explain their association. Dr. [redacted] asserts that the petitioner's work is "unprecedented" in that it is original. Any research, in order to be accepted for publication, must offer new and useful information to the pool of knowledge. It does not follow that every published researcher serves the national interest to an extent that justifies a waiver of the job offer requirement. Dr. [redacted] does not claim to be applying the petitioner's work and provides no examples of other laboratories that are doing so. Rather, he asserts vaguely that the petitioner's work has "given a great push in such topics."

We acknowledge that *Micro/Nano* published a brief summary of the petitioner's article on microsensors in *Sensors and Actuators*. The article does not mention the petitioner by name and, instead, credits "[redacted] and colleagues" at Louisiana Tech University with the development of the cantilever. The record contains no evidence regarding the significance of inclusion in this publication. We note that none of the summaries have a byline, suggesting that they are more akin to press releases by the innovators rather than independent journalistic coverage of the work discussed. Citations of the petitioner's work or licensing agreements would be far more persuasive evidence that his work is actually being applied beyond his own laboratory.

Dr. [redacted] discusses the petitioner's work at UIUC. While none of this work had been presented or published as of the date of filing, Dr. [redacted] asserts that the petitioner had already "achieved great results" in reproducing gas chromatograph on a scale as small as a millimeter. Dr. [redacted] asserts that the petitioner's results are an improvement over previous standards and that these results have applications "too numerous to enumerate." He concedes, however, that the laboratory still needs to take exact measurements and conduct performance trials before even publishing this work. Thus, the record does not establish that this work has already proven influential.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.